

STATE OF MICHIGAN
COURT OF APPEALS

SARAH J. LUTHER,

Plaintiff-Appellant,

v

JAMIE M. MORRIS and MICHAEL MORRIS,

Defendants-Appellees.

UNPUBLISHED

January 18, 2005

No. 244483

Muskegon Circuit Court

LC No. 01-041095-NI

Before: Markey, P.J., and Murphy and Talbot, JJ.

TALBOT, J. (*dissenting*).

I respectfully dissent from the majority opinion. In this no-fault action for noneconomic damages, the trial court granted defendants' motion for summary disposition, finding as a matter of law that plaintiff's impairment did not affect her general ability to lead her normal life. In an unpublished, per curiam opinion issued February 5, 2004, this panel reversed, relying on *Kreiner v Fischer (On Remand)*, 256 Mich App 680; 671 NW2d 95 (2003), and comparing plaintiff's injuries to those suffered by the plaintiff in *Straub v Collette (On Remand)*, 258 Mich App 456; 670 NW2d 725 (2003). The Supreme Court reversed both of those cases, *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), and has remanded this case for reconsideration in light of that decision.

In *Kreiner*, the Supreme Court stated:

If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "*any effect*" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life." [471 Mich 132-134 (footnotes omitted)].

The serious impairment inquiry must proceed on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations. *Id.* at 134 n 19. On remand, the panel is required to apply the quoted provision of the Supreme Court's decision, and redetermine whether plaintiff's two-month impairment was sufficient to be deemed to have affected her general ability to lead her normal life. The Supreme Court has not provided specific guidance in how to determine how long a serious impairment must last in order for it to be found to have affected a person's ability to lead her normal life. The Court acknowledged that a finding that the duration of an impairment is short does not preclude a finding of a serious impairment. *Id.* at 134.

Comparing this case to *Straub, supra*, provides the most guidance. In *Straub*, the plaintiff missed eight weeks of work due to injuries to his non-dominant hand. That was followed by three weeks of limited work time, and a ninety-nine percent recovery by four months after the accident. The plaintiff was precluded from processing deer in his bow shop that season, and he was unable to play bass guitar in his band during that period. Given the temporary nature of the injury, and the limited nature and extent of the injuries, the Court found that the course of the plaintiff's normal life had not been affected. *Id.* at 135-136.

Here, the injury was of shorter duration, but more serious. It affected plaintiff's dominant hand, and the use of her other hand was limited by a previous stroke. However, it is hard to say that a two-month impairment to a hand could be sufficient to show that the course of plaintiff's normal life has been affected. *Id.* at 136. Once the injury healed, plaintiff returned to her normal life. Considering the totality of the circumstances, a comparison with *Straub* supports a conclusion that plaintiff failed to prove that she sustained a serious impairment of body function.

/s/ Michael J. Talbot